An alternative argument was addressed to us that even if the Municipal Ordinance was repealed by the Local Government Ordinance the provisions of section 321(2) of the Local Government Ordinance could be invoked to extend the rating provisions of the Municipal Ordinance.

Having regard to the conclusion I have reached on the issue of whether there was an implied repeal of the rating provisions of the Municipal Ordinance it is unnecessary to deal with this point.

I rest my decision upon the finding that the Municipal Ordinance had not been repealed either expressly or by implication and its rating provisions and those in the Local Government Ordinance were and are in concurrent operation.

I am of opinion that this appeal should be allowed with costs.

Rose C.J.: I agree.

Ambrose J.: I agree.

Appeal allowed.

Solicitors: *Allen & Gledhill*; *Philip Hoalim & Co.*

SIVAGAMI ACHI v. P.RM. RAMANATHAN CHETTIAR & ANOR.

[O. C. J. (Ong J.) August 10, 1959]

[K.L. — Civil Suit No. 350 of 1958]

Practice and Procedure — R.S.C., O.19 r.27 — Application to amend or strike out defence — Whether each paragraph of the defence should be viewed in isolation or in relation to interconnected paragraphs — Effect of res judicata on issues raised in defence possibly not identical with those raised in previous action — Judicial notice of foreign law — Striking out defence as embarrassing on the ground that the law as pleaded may be bad.

Partnership — Effect of registration of name as partner — Whether registration as such estops co-partners from proving that the registered partner is a nominal or fictitious partner not entitled to any beneficial interest or to the reliefs claimed — Whether estoppel operates when true facts are known to the parties — Temporary arrangement made for mutual convenience — Condition precedent to attaching of obligation not performed — Defect in parties — Prima facie defence made out.

Foreign law — Judicial notice — Absence of expert evidence or arguments based on authoritative decisions.

This application under O. 19 r. 27 was made by the plaintiff, who claimed to be a partner in the money-lending firm of V.A.P.S. to amend or strike out the defence. The issues of fact and law as raised in the pleadings sufficiently appear from the judgment.

The plaintiff, *inter alia*, pleaded that on the death of her husband, a partner of the firm, intestate leaving no issue, his estate devolved on her as the sole beneficiary under the Mitakshara system of Hindu law: she was by mutual agreement with the co-partners registered as a partner under the relevant legislation; that income tax on her share of profits was paid in India by the surviving partners or their successors: that by orders of Court in 1947 and 1948 in proceedings, to which the co-partners were parties, certain lands, charges and subleases, forming part of the partnership assets, were vested in one Annamalai, one of the partners, as trustee as to one-quarter share thereof for her, being her share in the partnership and a trust deed to that effect was executed by him in 1948. In the action the plaintiff claimed dissolution of the partnership and other ancillary reliefs. Annamalai died intestate on April 27, 1957 and another partner also died intestate on March 2, 1958: no representatives to their estates had been appointed and the action was commenced only against the other two surviving partners.

Briefly the defence was, while admitting the fact of registration of her name as partner and the orders of court and payment of income tax in India, a total denial of partnership. It alleged that on the death of her husband intestate his estate devolved on the surviving co-partners, his three brothers, under the Hindu Law: that the plaintiff was only entitled to be maintained by them: secondly, that she was a nominal or fictitious partner not entitled to any reliefs; thirdly, that she was registered as a partner, merely as a temporary expedient in pursuance of a written agreement in 1935 to which she was a party, to preserve the estate of the deceased for a son to be adopted by her within 2 years "to their and her" satisfaction: that she had failed to adopt a son: the condition not having been complied with the trust in favour of the adopted son failed and the property reverted to the three brothers or their successors but the surviving co-partners were even then willing to allow her to adopt a son. The defence further contended that in the absence of the representatives of the deceased partners, the action was not maintainable.

Held, dismissing the application: (1) triable issues both on facts and in law have been raised and summary jurisdiction of the Court to strike out the defence cannot be invoked;

(2) each paragraph of the defence cannot be viewed in isolation but must be read in the context of interconnected paragraphs;

(3) on the meagre details placed before the Court it is not reasonably certain if the two orders of Court relied on by the plaintiff declared that the beneficial ownership of the lands, charges and leases ever passed to her and *prima facie* the defence does not seek to retry the previous actions and the plea of *res judicata* ought not to be tried under O. 19 r. 27 or, in any event, without more precise information;

(4) the Court is not entitled to take judicial notice of Hindu law and in the absence of expert evidence or arguments based on authoritative decisions as to rules of intestate succession cannot decide whether upon the death of the plaintiff's husband, his estate devolved on the plaintiff or, as is contended, on 3 surviving brothers, the co-partners;

(5) registration of name as a partner, though strong *prima facie* evidence of partnership, does not estop the co-partners from proving that the plaintiff was a nominal or fictitious partner under a temporary mutual arrangement made to carry out the agreement of 1935, alleged in the defence, that the share of the intestate in the partnership would only ensure to the benefit of a son to be adopted by her, which event had not happened;

(6) the action is defective for non-joinder of the representatives of two deceased partners and the defendants are under no duty to remedy the defect.

Cases referred to:—

(1) *Knowles* v. *Roberts* 38 Ch. D. 263.

(2) *New Brunswick Rly. Co.* v. *British and French Trust Corpn. Ltd.* [1939] 1 A.C. 1, 20.

(3) *Workington Harbour & Dock Board* v. *Trade Indemnity Co. Ltd.* [1938] 2 All E.R. 101, 102.

(4) *Attorney-General of Ceylon* v. *Ar. Arunachalam Chettiar & Ors. (No. 1)* [1958] M.L.J. 39; [1957] A.C. 513, P.C.

(5) *London Corpn.* v. *Horner* 111 L.T. 512.

(6) *Public Trustee* v. *Elder* [1926] Ch. 776, C.A. and *Lindley on Partnership* 11th Edn. pp. 565, 568, 608.

(7) *Sterios Thomopulos* v. *John Mandilas* [1948] A.C. 12.

(8) *Deota Din Singh* v. *Raj Narian Singh* A.I.R. 1934 All. 75.

(9) *Kemsley* v. *Foot* [1951] 2 K.B. 34, C.A. affirmed by H.L. [1952] A.C. 345.

INTERLOCUTORY APPLICATION.

Sir Roland Braddell (*R. Ramani* with him) for the plaintiff-applicant.

R. H. V. Rintoul (*D. G. Rawson* with him) for the defendants-respondents.

Cur. Adv. Vult.

Ong J.: This is an interlocutory application by the plaintiff for an order that the defence be amended or struck out on the ground that it is contrary to the rules of pleading and tends to prejudice, embarrass or delay the fair trial of the action, alternatively, that certain paragraphs of the defence be amended or struck out on the same grounds. During the argument much stress was laid on certain paragraphs of the defence having been intermixed and therefore not severable; and that the defence was evasive and insupportable in law.

Sir Roland Braddell entirely relied upon Order 19 r. 27. I would here observe that this was not an application for the action to be set down for trial on a preliminary point of law under Order 25 r. 2. No request for further and better particulars of the defence was made at any stage.

Arguments proceeded on the basis of an amended defence which was tendered at the hearing of this application. Sir Roland withdrew his objections to paragraphs 2 and 4 and conceded that those paragraphs as amended complied with the rules and were not embarrassing. He still maintained, however, that the whole of the defence should be struck out on the ground that it discloses no reasonable answer, having regard to the admissions made and the effect of estoppel and *res judicata*, and that, in any event, some of the paragraphs specified in the summons ought to be struck out as embarrassing.

Before embarking upon a consideration of the merits of this application I think it will be necessary to summarise briefly the facts and points of law in issue arising in the action.

On June 12, 1927, a moneylending business under the vilasam of V.A.P.S. was started in Kuala Lumpur by four brothers, Adaikalavan (the plaintiff's deceased husband), Sevugan, Annamalai and the first defendant Ramanathan, in partnership, each owning a quarter share. It is common ground that the individual shares of the partners were their separate property and did not form part of joint Hindu family property. This is implicit in paragraphs 3 and 6 of the Statement of Claim and admitted in paragraph 20 of the defence. The fact that they were not divided in status is immaterial, for the business started with their separate funds.

Adaikalavan died intestate on June 29, 1934, leaving the plaintiff his only widow and no issue. Letters of Administration to his estate were granted to and extracted by the plaintiff's attorney, one Muthiah Chettiar, on April 24, 1936.

The plaintiff alleges that on the death of her husband his one-quarter share was transferred to her with the consent of the surviving brothers (but no allegation is made as to any consent having been obtained from the administrator, Muthiah) and that after the Registration of Businesses Enactment, 1939, came into force she was registered as a partner, in substitution for her husband, with effect from his death.

It may be convenient at this stage to refer to the subsequent changes in the personnel of the V.A.P.S. firm. On January 23, 1941 Sevugan died intestate and his two sons Kathiresan and Ramasamy, succeeded each to a moiety of his share and were admitted into the partnership. The plaintiff's case is that the death of her husband was not treated as dissolving the partnership, which continued as before. On and from January 23, 1941 the partners were, according to the statement of claim, Annamalai, his brother, Ramanathan, the plaintiff and the 2 nephews, Kathiresan and Ramasamy.

Annamalai died intestate on April 27, 1957. His death was followed by that of Kathiresan intestate on March 2, 1958. No personal representatives to the estates of these two persons have yet been appointed.

The main plank on which the plaintiff rests her claim is estoppel and *res judicata*.

The facts relied on by her are, briefly: first, that on the death of her husband she became his sole heir and succeeded to his share as partner with the consent of the surviving brothers; that she was registered as a partner under the relevant legislation sometime after 1939, and continued while the Ordinance was in force to be so registered; and that income tax on the share and profits due to her was paid in India by the firm ever since she was admitted into the partnership. On that basis she claims a declaration that the partnership has been dissolved at the date of institution of the action, winding-up of the partnership, all necessary accounts and enquiries, and appointment of a Receiver.

Secondly, she relies upon two orders of Court made in 1948 in Originating Summons No. 167 of 1947, in which one Karuppan, as administrator of Sevugan, obtained leave of the Court to transfer certain lands, charges and sub-leases to Annamalai, (one of the original partners) as trustee for himself, Ramanathan, Kathiresan, Ramasamy and the plaintiff, upon his executing a proper deed of trust to that effect. On June 15, 1948 Annamalai duly executed such Deed of Trust, and from June 30 the same year until today remains so registered as trustee. The lands, charges and sub-leases referred to formed part of the partnership assets. These orders were obtained by C. T. Raman Chettiar who was the attorney of Karuppan (the administrator of Sevugan) and also of all the then partners in V.A.P.S. On the basis of those orders, and in her capacity as partner, she claims a declaration against the present defendants that such properties are held in trust as to one-quarter share therein for her.

The defence is partly a denial and partly by way of confession and avoidance, and my view, upon a careful consideration of this application, is that it would not be right or proper to take each paragraph of the defence in isolation, but in relation to interconnected paragraphs. The key to the defence lies in paragraphs 20, 21, 22 and 23 to which reference will presently be made. I would here observe that the plaintiff never claimed, nor was it conceded, that at any time after she was admitted into the partnership had any accounts been rendered to her, or any part of the profits paid to her personally.

The defence, briefly, is that she never was a partner or a beneficial partner in the firm, but that she has been all throughout only a nominal or fictitious partner; that she did not — having regard to the fact that her husband's share in the partnership was personal property, the distribution of which was regulated by the Mitakshara system of Hindu Law, the *lex domicilii* — inherit any part of the property left by her husband, but was only entitled as a widow to be maintained by the three brothers who, it was contended, according to the law applicable to intestate succession, inherited the whole of her husband's share in the partnership in the absence of any male issue; that it was never their intention to nor did they ever make a gift of their share to the plaintiff; that registration of her name as a partner was merely a temporary arrangement resorted to as an expedient for carrying into effect an agreement in writing dated January 28, 1935 between the plaintiff, her father, and the three surviving brothers in implementation of an earlier written agreement between these brothers themselves, which was made immediately following the death of the plaintiff's husband in order to keep his share as a separate share for the benefit of a son to be adopted by her within two years to their and to her satisfaction. She had not, at the time when the writ herein was issued, adopted a son, and the consideration for the agreement having failed, such share would normally revert to the three brothers or their representatives, but the present defendants are even now agreeable to an adoption: see para. 23.

The Orders of Court referred to are admitted, but what is not admitted is that the beneficial interest in the share of properties to be held in trust for the plaintiff ever passed to her, by reason of the agreement of 1935. The defence does not seek to retry the previous actions, in which event, of course, the plea would be embarrassing and should be struck out: *Knowles* v. *Roberts*[1]. But, as I understand it from the defence, what it does is to raise an issue as to beneficial ownership which *prima facie* does not appear to have been directly in issue in the earlier proceedings.

I need only invite attention to the judgment of Viscount Naugham L.C. in *New Brunswick Rly. Co.* v. *British & French Trust Corporation Ltd.*[2]:

> "If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them; but in my view the doctrine cannot be made to extend the presumptions or probabilities as to issues in a second action which may be, and yet, cannot be asserted beyond all possible doubt to be, identical with those raised in the previous action."

In my opinion it is unsatisfactory to decide a plea of *res judicata* unless a point of law so raised by the plea is set down to be heard as a preliminary point, and I would refer to Lord Atkin's judgment in *Workington Harbour & Dock Board* v. *Trade Indemnity Co. Ltd. (No. 2)*[3]. It is all the more so when all the relevant papers in connection with the earlier proceedings are not before the Court to enable it to determine whether the particular issue in dispute had been raised and determined.

I cannot obviously take judicial notice of Hindu Law on which there is no expert evidence before me, nor have any arguments been addressed to me from the Bar based on authoritative decisions on Hindu Law as to rules of intestate succession under the Mitakshara system. The only case, *A.G. of Ceylon* v. *AR. Arunachalam Chettiar (No. 1)*[4], referred to by Mr. Rintoul, is clearly irrelevant because it deals, not with the rules of intestate succession with regard to self-acquired property, but with joint Hindu family property which on the death of a coparcener devolves upon the surviving coparceners. In the present case, however, it is common ground that the share left by Adaikalavan was his own separate property, even though the defence alleges he was a member of a joint Hindu family and was not divided in status. In the absence of any evidence, however, I cannot obviously at this stage decide whether, on the death of Adaikalavan intestate, the plaintiff, as his sole widow, was entitled to the whole of the estate left by her husband or she was only entitled to be maintained by the deceased's three

brothers who, it is claimed, succeeded as his heirs. In my opinion paragraph 20 of the defence raises a triable issue. This defence may not turn out to be a good and valid defence but affords no reason to strike it out as embarrassing: *London Corporation* v. *Horner*[5]:

Paragraph 5 of the defence raises a question of non-joinder of necessary and proper parties to this partnership action. It is founded on the plaintiff's admission in paragraph 9 of the Statement of Claim, that since January 23, 1941, there had been five partners. The action had been instituted by the plaintiff against only two of the partners; the legal representatives of Annamalai and Kathiresan have not been made parties to the action. The reasons for this appear in the letter of the solicitors for the plaintiff to those of the defendants dated October 6, 1958:

"From what you say on the question of representation it looks as though there must be a considerable delay before legal personal representatives of the two deceased Chettiars can be appointed. The plaintiff's living expenses here will amount (sic) up, and she is anxious for us to press on with her suit so that it can be heard as soon as possible. Under the circumstances we shall have to make an application to Court."

No application has so far been made to or granted by the Court for appointment of representatives to be added as co-defendants to this action. In my view paragraph 5 of the defence is not only most relevant but goes to the very root of the plaintiff's claim for dissolution, accounts, winding-up of the affairs of the partnership, and appointment of a Receiver. I do not think that the Court has jurisdiction, even with such consent, to dispense with necessary and proper parties in a partnership action, and with respect, I am unable to agree with Sir Roland's submission that it is the duty of the defendants to remedy the defect as to non-joinder of parties. *Public Trustee* v. *Elder*[6], in my opinion, cannot be overlooked. I do not say that this defect cannot be remedied at any time before the final trial, but until this is done, it is a fatal objection to the action.

As to paragraph 7 of the defence, it merely reiterates that the plaintiff is not a partner and as such her consent was not necessary to the introduction of new partners, and states what is obvious law as to the effect of Annamalai's death.

I do not agree that paragraph 12 is embarrassing. The plaintiff's right to account is denied, and the defendants justify their refusal to render accounts on that ground. It cannot be said, until she establishes her right to account, that she is entitled to particulars of loss or profits in any year.

Paragraphs 16-19 which are objected to the same ground are highly relevant, if due regard be had to paragraphs 20 - 23 of the defence, for they must be read in conjunction, subject to the plaintiff's contention as to estoppel. If the plaintiff was merely a nominal or fictitious partner, as alleged by the defence, and if the three surviving brothers are not entitled to succeed to the whole or any part of Adaikalavan's estate, then the only person who has the legal capacity to ask for accounts would be the administrator, Muthiah Chettiar. It is not alleged that the plaintiff at any stage had become in his place administratrix of her husband's estate. His action in 1949 for accounts was dismissed in 1952 as being barred by Limitation, and an appeal against that decision failed in 1953. But for those other arrangements referred to in paragraphs 21, 22 and 23 of the defence there appears to be nobody else entitled to bring any action in respect of Adaikalavan's share. The effect of the agreement in writing of 1935 is that, if, in pursuance of that arrangement, the plaintiff had adopted a son, the latter would have been the proper person to claim reliefs against the defendants.

There now remains for me to deal only with the further argument on estoppel. As to that part of the plaintiff's claim resting on estoppel, to which reference has already been made, the allegations in para. 6 of the statement of claim, namely, that her husband's one-quarter share was transferred to her by the consent of the three surviving brothers, were specifically denied. What they admitted was the fact of registration of her name as a partner since 1939 under the Registration of Businesses Enactment, No. 11 of 1939, by reason of the agreement in writing of 1935, to which she herself was a party. In my view the mere fact of her registration as a partner does not estop the co-partners from alleging and proving that she was a nominal partner. Registration is merely *prima facie* though strong evidence of partnership. The object of the enactment is quite evident from the judgment of the Judicial Committee of the Privy Council in *Sterios Thomopulos* v. *John Mandilas*[7]: which is implicit in section 8, that is, to bar a claim made by a defaulting firm against third parties. Estoppel only operates in two instances, under section 6(2) of the present Ordinance No. 47 of 1956, which is in *pari materia* with the earlier legislation, in respect of estate duty payable on the death of an ostensible registered partner in respect of his share and, under section 8(1)(a), in favour of creditors or those dealing with the firm on the faith of the register.

As to payment of income tax in India it is clear that a nominal partner is an accounting party as much as any real or beneficial owner. Estoppel cannot operate where the true facts are known to the parties and who merely made a temporary arrangement for their mutual convenience: *Deota Din Singh* v. *Raj Narian Singh*[8]:

The defence, therefore, in my opinion raises very serious controversial issues of fact and of law, and an application under O. 19 r. 27 is clearly inapt, because striking out any matter in the defence on the grounds specified in that rule ought to be confined to plain and obvious cases: *Kemsley* v. *Foot*[9]:

In the result, this application fails. The costs of an occasioned by this application will be defendants' costs in any event.

Application dismissed.

Solicitors: *Braddell & Ramani; Shearn, Delamore & Co.*